UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

KINGSPAN INSULATED PANELS D/B/A KINGSPAN BENCHMARK

and

Cases 09-CA-072906 09-RC-069754

SHEETMETAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 24

ORDER¹

Counsel for the Acting General Counsel's Request for Special Permission to Appeal Administrative Law Judge Arthur J. Amchan's April 23, 2012 Order denying the petition to revoke the subpoena issued to field attorney Joseph Tansino is granted. We find that the Administrative Law Judge's Order requiring Tansino to appear and give testimony at the hearing on April 30, 2012 is premature because, at this point in the proceedings, it is not apparent that the testimony of Tansino is necessary to resolve the challenged ballots.

As stated in *Drukker Communications, Inc. v. NLRB*, 700 F.2d 727 (D.C. Cir. 1983), the evaluation of whether the evidentiary privilege asserted by counsel for the Acting General Counsel applies to Tansino's testimony involves the balancing of "need against harm." 700 F.2d at 731. In *Drukker*, which involved an underlying consent election, the court found that the privilege did not shield the subpoenaed testimony of a Board agent concerning an alleged oral agreement to exclude certain employees from the agreed-upon unit. There, the parties' dispute could not be resolved by reference to the agreed-upon unit description, both because the language was reasonably

¹ The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

susceptible to different interpretations and because the employer's position implicated a legal issue—whether the disputed voters were statutory employees at all. Id. at 732. In addition, there was an actual conflict between the union attorney's testimony and that of the respondent's attorney about a conversation between them that was witnessed by the Board agent. Id. at 733.

Here, as the Respondent recognized in its Section 102.118 request to the Acting General Counsel, the parties' dispute might be resolved without the need for any testimony at all under *Caesar's Tahoe*, 337 NLRB 1096 (2002), if the judge finds the parties' stipulation unambiguous. Further, even assuming an ambiguity, there has been no testimony yet and, thus, we are not confronted with an actual conflict. In these circumstances, we find that the judge's order is premature. If, however, the judge determines that the parties' stipulation *is* ambiguous, and he further determines that any testimony the parties may give² creates a factual conflict that can only be resolved by the testimony of Tansino, then Tansino's testimony may be compelled at that time; provided, that his testimony shall be strictly limited to the parties' factual dispute. See *Drukker*, supra, 700 F.2d at 732 fn. 4.

Dated, Washington, D.C., April 27, 2012.

RICHARD F. GRIFFIN, JR, MEMBER
TERENCE F. FLYNN, MEMBER

SHARON BLOCK, MEMBER

² In this regard, we observe that there are witnesses other than Board employees who may be available to testify about the pertinent facts.

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